Supreme Court, U.S.
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No. 09-491

In The Supreme Court of the United States

CITY OF LONG BEACH,

Petitioner,

v.

LONG BEACH AREA PEACE NETWORK;
DIANA MANN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

This case represents a fundamental error in interpreting "the distinction between permits designed to censor and those designed to regulate competing uses in public areas." *Berger v. City of Seattle*, 569 F.3d 1029, 1066 (9th Cir. 2009) (Chief Judge Alex Kozinski, dissenting) (citing *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002)).

As in *Thomas v. Chicago Park District*, the Long Beach special event ordinance ("Ordinance") does "not [seek] to exclude communication of a particular content, but to coordinate multiple uses of limited space . . . and to assure financial accountability for damage caused by . . . [a special] event" conducted on public property. *Thomas*, 534 U.S. at 322. Indeed, on all occasions, Respondents obtained a permit from the City and conducted their special event as requested.

The Respondents' and the Ninth Circuit's determination that the Long Beach Ordinance is unconstitutional ignores the above distinction re-emphasized by this Court in *Thomas*, 534 U.S. 322, and relies on inapplicable cases involving the absolute censor of expressive activity instead of the application of reasonable time, place and manner regulations to permitted activity.

The Ninth Circuit's practice of ignoring this Court's precedent and relying on its own interpretation of the law wreaks havoc not only on the City of Long Beach, but every city, county, state, and federal entity within Ninth Circuit's boundary (constituting

nine states, two territories, and one-fifth of the U.S. population). Unabated, entities such as the National Park Service will have to operate under two sets of rules (for events inside and outside the Ninth Circuit) and local governments cannot protect the taxpayer from the excessive costs of granting the private use of public property. This dilemma is real and the solution is in the hands of this Court.

I. The Waiver Provisions Of The Long Beach Ordinance Are Constitutional

A. The Very Rigidity That Was Rejected By This Court Is Exactly What The Ninth Circuit And Respondents Contend Is Required

In *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002), this Court held that the permissive waiver of time, place and manner requirements which could otherwise be constitutionally imposed on a permittee "furthers, rather than constricts, free speech" and that while "[g]ranting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, . . . we think that this abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements." *Id.* at 325; *accord Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004).

Rather than avoiding the very rigidity rejected by this Court, Respondents and the Ninth Circuit claim such rigidity is required. Citing Ninth Circuit precedent for this proposition, Respondent contends that in order to waive otherwise constitutional time, place and manner regulations, "a regulation must provide objective standards that do not . . . enabl[e] the official to favor some speakers and suppress others." Opp. 24 (quoting *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1139 (9th Cir. 2004)). Such a contention contradicts *Thomas v. Chicago Park District*, *supra*, 534 U.S. 316, 325, and *Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004).

Indeed, the Ninth Circuit and Respondent miscontrue the distinction drawn by this Court between (1) the criteria needed to impose a constitutionally viable time, place and manner regulation and (2) the criteria needed to waive a constitutionally valid requirement that could otherwise be lawfully imposed on a permittee. Respondent contends that the test is the same for both instances. This Court has held that they are not. *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

Respondents' citation to *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005) is equally unavailing. Indeed, the waiver at issue in *City of Dearborn*, *supra*, was constitutionally dissimilar to the waiver here, the waiver in *Thomas* (534 U.S. 316), and the waiver in *Parks v. Finan*, (385 F.3d 694). Rather, the waiver in

City of Dearborn, *supra*, constituted the bases for granting or denying a permit and, therefore, was properly judged by a different standard than is applicable in the present case. *See Parks v. Finan*, 385 F.3d 694, 700 (6th Cir. 2004) ("[b]ecause the waiver provision does not act as a restriction on expressive activity, the discretion must be treated differently from that contained in the bases for granting or denying a permit. . . .").

B. The Record Is Void Of Any Evidence Of A Pattern Of Unlawful Favoritism

Respondents' conclusion that the City's "waiver provision has been used capriciously to impose a substantial financial burden on Respondents" (Opp. 27), is not only speculative, but is necessarily premised upon the false assumption that Respondents are not required to reimburse the City when the City incurs significant expense due to their event. Respondents attempt to divert attention from this fact by raising the nefarious inference of favoritism due to the fact that they were not charged for a prior event allegedly attended by a single city councilman. What Respondents conveniently omit is the fact that the City did not incur any significant expense with respect to this prior event. (ER: 38). Moreover, Respondents' assertion that "any City Council

member . . . [can] waive all fees and costs for a special event" (Op. 8) is incorrect.[1]

Consequently, the conclusion that the fees were waived in the prior was because governmental officials participated in the prior event is pure "speculation this Court is not permitted to indulge in when nullifying the acts of a legislative branch" (*Carey v. Brown*, 447 U.S. 455, 476, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (Rehnquist, dissenting)) and does not evidence a pattern of unlawful favoritism.

II. The Long Beach Ordinance Is Not Speculative

LBMC § 5.60.010(I)(3) provides that a special event permit is required for an "organized activity involving seventy five (75) or more persons . . . which involves the use of, or has an impact on, public property or facilities and may require the provision of city services in response thereto." (App. 194). The City subsequently issued an administrative regulation which limited the application of LBMC § 5.60.010(I)(3) to circumstances where "[t]he activity is likely to require the provision of city services for the purpose of: . . . street blockage, . . . erecting

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[1] The waiver provisions contained in LBMC §§ 5.60.050(A) and 5.60.090(A) provide that the waiver of permit fees or departmental services charges may only be accomplished by action of the entire City Council – not any single member. (App. 210, 217).

barriers, . . . construction, . . . traffic control, and/or . . . litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)." (App. 224).

Citing *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005), Respondents contend that the City's narrowing construction is vague and speculative. Opp. 10-11. Such a contention is without merit and is not supported by the cited authority.

In *City of Dearborn*, *supra*, 418 F.3d 600, the City of Dearborn enacted an ordinance that provided that "it shall be unlawful to participate in any special event upon any street, park or public area of the city of Dearborn unless such activity is granted by resolution of the City Council." *Id.* at 603. Such an ordinance was deemed overbroad "because virtually any group of two or more persons walking on a public right of way . . . would presumably be required to possess a permit under the Ordinance." *Id.* at 608. The City of Dearborn subsequently offered a narrowing construction which provided that a permit is only required if the activity required the provision of unspecified city services. *Id.* at 613. Beyond failing to provide a small group exception, the Sixth Circuit found the ordinance unconstitutional because the narrowing construction was vague as to when and what city services may be required. *Id.* at 614.

Unlike *City of Dearborn*, *supra*, 418 F.3d 600, Long Beach's administrative regulation only requires

a permit when five (5) specific city services are likely to be required (street blockage, erecting barriers, construction, traffic control, and litter abatement (for amounts in excess of that normally expected for the public property or facilities involved)). Whether these specific services will be needed is within the knowledge of event organizers, leads to no speculation, and avoids the numerical and vagueness issues found in *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005).

III. The Requirement Of A Special Event Permit In Order To Recoup Costs Caused By Litter Abatement Is Constitutionally Permissible

There is a vast constitutional difference between (1) regulations *absolutely prohibiting* First Amendment activity and (2) regulations seeking to advance a legitimate governmental interest by adding a reasonable time, place and manner requirement to permitted First Amendment activity. The first is a prior restraint subject to strict scrutiny while the second is not.

The Ninth Circuit and Respondent contend that litter abatement is not a legitimate governmental interest by relying on inapposite cases where public entities sought to *absolutely prohibit* First Amendment activities in the name of litter abatement. *See Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939) (regulation banning leafleting);

Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (regulation banning door-to-door solicitation); *Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319 (1st Cir. 1993) (regulation banning leafleting); *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998) (regulation prohibiting placing religious literature under windshield wipers of parked vehicles); *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003) (regulation prohibiting leafleting).

Contrary to the authorities on which Respondent relies, the City does not seek to prohibit First Amendment activity in the name of litter abatement. *See Paulsen v. Gotbaum*, 982 F.2d 825 (2nd Cir. 1992). Rather, by requiring a permit when a special event is likely to generate litter in amounts in excess of that normally expected for the public facilities involved, the City is simply seeking "financial accountability for damage caused by the [permitted] event." *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322. Accordingly, the Ordinance is "easily distinguishable [from cases] . . . involv[ing a] complete ban[] of a certain type of speech. . . ." *Paulsen v. Gotbaum*, 982 F.2d 825, 829 (2nd Cir. 1992); *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

As here, *Paulsen v. Gotbaum*, 982 F.2d 825, dealt with a permitting scheme for large special events in New York City parks "includ[ing] concerts by Pavarotti and Paul Simon, the New York City Marathon, and the Billy Graham Crusade" (*id.* at 829) and it was similarly contended that "the requirement of the clean-up bond for the distribution of literature . . .

constituted an impermissible and unconstitutional burden on free speech." *Paulsen v. Gotbaum*, 982 F.2d at 827-28. Accordingly, Respondents attempt to distinguish *Paulsen* by stating that the ordinance in "*Paulsen* . . . did not [seek] . . . to recoup the costs of litter abatement" (Opp. 15 n. 7) is inaccurate.

Lastly, Respondents' contention that this issue is moot is not well taken. Indeed, the result of *all* administrative action in this matter leaves the Ordinance and its narrowing construction exactly as they existed on the date the Ninth Circuit rendered its decision herein.[2]

Accordingly, requiring a permit when a special event (including, but not limited to the Long Beach

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[2] There is currently pending a hearing in the District Court regarding severability as directed by the Ninth Circuit on remand. The City's motion to stay proceedings pending resolution of the City's Petition for Writ of Certiorari was denied by both the Ninth Circuit and the District Court. Accordingly, in order to save the balance of its Ordinance which was necessary for ongoing operations, the City issued an administrative regulation to demonstrate the viability of the Ordinance should the Ninth Circuit's opinion be upheld. This subsequent and unpublished regulation has since been revoked and the original narrowing construction referenced by the Ninth Circuit is in full force and effect. *See* AR 8-31 (Reply App. 1); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a[n] . . . enforcement agency has proffered") (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

Grand Prix and Long Beach Jazz Festival[3]) will generate excessive litter and debris for which the City will be financially burdened is a constitutionally permissible time, place and manner regulation and the Ninth Circuit's opinion to the contrary is in direct conflict with *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) and *Paulsen v. Gotbaum*, 982 F.2d 825, 829 (2nd Cir. 1992).

IV. The Availability of Streets And Sidewalks Provides Ample Alternate Means Of Communication For Persons Unable To Obtain Permission To Conduct A Spontaneous Parade, Assembly, Or Demonstration

Contrary to the panel's holding, the Ordinance provides ample alternative means of communication for people wishing to participate in spontaneous expressive events by allowing groups unable to obtain or denied permission to conduct a spontaneous parade, assembly or demonstration[4] to conduct their event on any "street[], sidewalk[], or other public rights-of-way owned or controlled by the City . . . [so

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[3] "The effect of the rules must be viewed in . . . light of all . . . events." *Paulsen v. Gotbaum*, 982 F.2d 825, 829 (2nd Cir. 1992); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296-97, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) ("the validity of [the] regulation need not be judged solely by reference to the demonstration at hand.").

[4] LBMC § 5.60.030(A)(5).

long as] applicable traffic regulations, laws or controls are complied with." LBMC § 5.60.030(A)(3) (App. 198); *Frisby v. Schultz*, 487 U.S. 474, 180 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (the availability of public streets and sidewalks "makes it virtually self-evident that ample alternatives remain").

Respondents' Opposition utterly fails to address that for "'time out of mind' public streets and sidewalks have been used for assembly and debate, the hallmarks of a traditional public forum" and provide ample alternative means of communication. *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (citing *Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)); *Cornelius v. NAACP Legal & Educational Fund, Inc,*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

V. The Long Beach Ordinance's Indemnification Provision Is Constitutionally Permissible

The Long Beach Ordinance requires permittees to indemnify and hold the City harmless from any "claims, damages, expenses, loss, or liability . . . arising out of, or resulting from the alleged acts or omissions of [a] permittee . . . in connection with the

permitted event or activity . . . " LBMC § 5.60.080(A) (App. 214-15) ("Indemnification Provision"). The permit application follows this language by stating that the permittee "will hold the City harmless from liability caused by the conduct of the event." App. 58.

After reiterating the panel's opinion, Respondent asserts that the Indemnification Provision is unconstitutional because it does not contain the language "proximately caused by the action" of the permittee. Opp. 22. While Respondent can cite no authority for requiring this language, such a requirement is in direct conflict with the Ninth Circuit's holding in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) (upholding an indemnification provision absent such language) as well as the indemnification provision of the National Park Service (36 C.F.R. § 25156(d)(1)) and the federal General Services Administration. *See* Petition p. 35.

Likewise, the panel's and Respondents' contention that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), precludes indemnification is not well taken. Unlike *Claiborne Hardware*, *supra*, indemnification here is limited to the "acts or omissions of [the] permittee" (App. 214-15), *not* third parties. Moreover, the First Amendment does not excuse a permittee for damage he causes to public property. Simply put, a public entity is entitled to seek "financial accountability for damage caused by . . . [a special] event" by and

through indemnification. *Thomas v. Chicago Park District*, *supra*, 534 U.S. at 322.

Lastly, it is important to reiterate that the statement in the City's special event permit application providing that the permittee "will hold the City harmless from liability caused by the conduct of the event" is grammatically consistent with the Ordinance and does not expand indemnification to include the actions of third parties and, to the extent it is, in any way inconsistent with the Ordinance, it must be disregarded. *United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) ("In construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)).

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should properly be granted.

Respectfully submitted,

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Administrative Regulation

Number AR 8-31, Issue 1
Effective: January 4, 2009

I. Purpose

The purpose of this regulation is to rescind administrative regulation AR 8-28, Issue 2 and to reinstate AR 8-28, Issue 1 which sets forth policies and procedures governing the implementation of Long Beach Municipal Code Chapter 5.60 (Parades and Special Events).

II. Scope

This regulation is applicable to all City departments and offices responsible directly to the City Manager. Any and all existing administrative regulations in conflict with this regulation are hereby rescinded. It is also requested that elective and other independent offices and departments of the City comply with these procedures in the interest of administrative uniformity.

III. Amendment

The City Manager may amend the procedures and contents set forth in this regulation from time to time as appropriate. Any amendment shall supercede any previously issued version and/or issue.

IV. Policy

Effective immediately, administrative regulation AR 8-28, Issue 2 is hereby rescinded and administrative regulation AR 8-28, Issue 1 is hereby reinstated and is in full force and effect.

V. *Authorized By:*

/s/ Patrick H. West
Patrick H. West,
City Manager